IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0021
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
MARTY GENE GROVE,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR 20062680

Honorable Charles S. Sabalos, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Katia Mahu — Tucson
Attorneys for Appellee

Wanda K. Day — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, Marty Gene Grove was convicted of public sexual indecency to a person under the age of fifteen and indecent exposure to a person under the age of fifteen. The trial court sentenced Grove to concurrent, presumptive prison terms of 2.25 and 1.75 years for repetitive offenses. On appeal, Grove argues that the prosecutor committed

misconduct by referring to him as a "predator" in her opening statement and closing arguments, and that the trial court abused its discretion by precluding him from questioning the victim about a prior false allegation of child molestation. We affirm.

Background

¶2 We view the evidence and reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 922 P.2d 1135, 1137 (App. 1999). When the victim, M., was eight years old, she spent the night at her friend's house. The friend and the friend's younger sister lived with their grandmother at the time. Grove, the grandmother's brother, was staying at the house as well.

¶3 On the night in question, M., her friend, and Grove were watching a movie in the living room while the grandmother and the younger sister were in the bedroom. M. testified that, when her friend went into the kitchen to get something to eat, Grove got up from his chair, stood in front of M., pulled down his pants exposing his "private" to her, and began "playing with it." He stopped when the grandmother called from the bedroom that it was time for bed. At that point, Grove "hopped back in his chair," and M. went into the bedroom. M. told her friend what had happened, but the friend laughed. M. reported the incident to another friend's mother the following day and then to adults at her school.

Discussion

Prosecutorial Misconduct

¶4 Grove contends that the prosecutor committed misconduct by referring to him as a "predator" in her opening statement and closing arguments. The prosecutor began her

opening statement by saying: "The Defendant, Marty Grove, is a predator, a predator who was left alone briefly, momentarily with an eight-year-old little girl, and he used that moment to take advantage of her and to try to gratify his own sexual desire." She began her closing argument with a nearly identical statement.

¶5 In Grove's closing argument, Grove's counsel argued there was no evidence that Grove was a "predator." The prosecutor then made the following statements in rebuttal:

> Lastly, defense counsel wants to suggest to you that the Defendant isn't a predator. Let's talk about a predator for a moment.
>
> . . . .
>
> Ladies and gentlemen, even a predator on the Serengeti in Africa, a predator that is chasing an antelope knows how to do it. They know that when you're attacking a pack, as we've probably all seen on the Discovery Channel, you go after the weak one, the small one, the one that is left alone and by themselves. That is exactly what the Defendant tried to do to M. On May 10th. He went after the little girl that was alone.

¶6 Grove did not object to the prosecutor's remarks during opening statement or during the prosecutor's initial closing argument. Because he failed to object below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990) ("failure to object to . . . comment in closing argument constitutes waiver of the right to review unless the comment amounts to fundamental error"). Fundamental error is that which goes "'to the foundation of the case, error that takes from the defendant a right essential to his defense,

and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20.

¶7 Grove does not argue on appeal that the prosecutor's statements to which he did not object constituted fundamental error or that he was prejudiced by them. Therefore, he has failed to meet his burden under this standard. *See State v. Moody*, 208 Ariz. 424, ¶ 165, 94 P.3d 1119, 1157 (2004) (appellant who failed to object at trial also failed to meet burden of demonstrating fundamental error when he developed no argument that error "rendered it impossible for him to have received a fair trial").

¶8 Grove objected to the prosecutor's rebuttal argument. However, "[t]o prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974). Grove has made no such showing here. The prosecutor's comparison of Grove to a "predator on the Serengeti in Africa" may have exceeded the bounds of proper argument. *See Comer*, 165 Ariz. at 426, 799 P.2d at 346 (prosecutor's name-calling went beyond argument and constituted "an appeal to the jury's passion and prejudice"). However, the argument did not permeate the trial, infect it with unfairness, or amount to a denial of due

process. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191; *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

Prior Allegation of Abuse

¶9 Grove argues that his "rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4 and 24 of the Arizona Constitution were violated when the Court refused to allow defense counsel to question the alleged victim regarding her prior false accusations of sexual misconduct against others." Because Grove raised none of these constitutional issues below, we review for fundamental error only.[1] *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶10 Grove asserts that the state moved in limine to prohibit him from asking M. whether she had ever accused her father of touching her inappropriately. Neither the prosecutor's written motion, nor the report on which it was based, are in the record before this court, but the following was transcribed on the record prior to trial.

> MS. KELLY [prosecutor]: I wanted to put on the record a motion that I filed yesterday in light of evidence that came to light in a conversation with the victim yesterday.
>
> Basically, what it is is just a motion to preclude any prior allegations of the victim making a false statement or an accusation that she had been touched inappropriately; and the motion is predicated on ARS [§] 13-1421.

[1]On appeal, Grove asserts that he raised no constitutional issues because he did not have time to respond in writing to the state's motion in limine. The state filed its motion in limine the day before trial. However, Grove did not object to the timing of the state's motion, and he had ample opportunity to respond to it the morning of trial.

> Basically, the victim denies that the statement was ever made by herself. She said she never made it.
>
> THE COURT: Who says she made it?
>
> MS. KELLY: The best that I can understand is that, perhaps, it was maybe a small child, an eight-year-old or even younger, a seven-year-old had said that maybe that's what they heard. We have no evidence that—
>
> THE COURT: Who did the seven-year-old tell that to?
>
> MS. KELLY: It's a good question. Basically, all I have is a report that said that some child or person said that she made this statement, and then they said that when she was confronted with the statement, she said, "Oh, no, I was just kidding."
>
> Well, she was taken to CAC [Child Advocacy Center] right after that happened, and she said, "I never said that, never made that statement." In my interviews with her yesterday, she said she never made that statement and she said that all she had said was she was talking to a friend of hers and said, "When I was a little girl, my dad used to bathe me." That is all she said.
>
> So I have no idea where it is coming from, but it was certainly something that we disclosed. It was just a prior CAC report that we disclosed to defense counsel. There is no person out there that heard it.

¶11 When the trial court asked Grove's counsel for his position on the state's motion, he replied that he "was just going to ask [M.] on the stand if she ever made a false accusation against her father for the same kind of behavior," stating: "I think it is relevant. I mean part of the State's theory is why would somebody lie about something like this. It goes to show that she might have lied about it in the past."

¶12 The trial court confirmed that there had never been a finding that M.'s father had or had not improperly touched her, and granted the state's motion, ruling:

> It is collateral impeachment at best, and there isn't any—there isn't an adequate showing that she made any claim of sexual impropriety. Even if she did, there is no showing that it is a false claim, and I think the probative value of it would be substantially outweighed by the danger of unfair prejudice to the State in this case.
>
> Therefore, the State's motion to preclude the evidence is granted over defense counsel's objection.

¶13 Initially, we note that, because the state's motion is not in the record before us, the record is unclear whether the state had moved in limine to preclude Grove from asking M. whether she had ever falsely accused her father of inappropriately touching her, or whether the state had merely moved to exclude the CAC report from evidence. Hence, the scope of the trial court's ruling is also unclear.

¶14 Although it appears from Grove's opening brief that he was aware before he filed the brief that the state's motion had not been included in the trial court record, he made no attempt to correct or modify the record to include the motion. *See* Ariz. R. Crim. P. 31.8(h). "It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal." *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). "Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court." *Id.* And Grove has not argued on appeal that the report was admissible.

¶15 But even assuming, as Grove contends, that the trial court precluded Grove from asking M. whether she had ever made a false report about her father touching her inappropriately, we find no error. "Trial courts have broad discretion in ruling on the admission of evidence." *State v. Campoy*, 214 Ariz. 132, ¶ 5, 149 P.3d 756, 758 (App. 2006). A trial court may exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. Likewise, "'[a]lthough the right to cross-examine a witness is vital to the right of confrontation, the trial court reserves discretion to curtail the scope of cross-examination to within reasonable limits.'" *State v. Cox*, 201 Ariz. 464, ¶ 5, 37 P.3d 437, 439 (App. 2002), *quoting State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996). A restriction on the scope of cross-examination is permissible when it does not "'unduly inhibit[] the defendant's ability to present information bearing on issues or on the credibility of witnesses.'" *Id.*, *quoting Doody*, 187 Ariz. at 374, 930 P.2d at 451.

¶16 The state apparently based its motion on A.R.S. § 13-1421, commonly known as Arizona's rape-shield law. Section 13-1421 allows a defendant to introduce evidence of a victim's previous false accusations against others only "if the trial court determines that the relevance and probative value of the information outweigh its prejudicial effect and if the defendant is able to prove the existence of accusations by clear and convincing proof." *Id.* In *State v. Gilfillan*, 196 Ariz. 396, ¶ 20, 998 P.2d 1069, 1075 (App. 2000), Division One of this court found that, although the restrictions imposed by § 13-1421 "clearly implicate

the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article 2, sections 4 and 24 of the Arizona Constitution," the restrictions are constitutional.

¶17 In this case, Grove did not prove by clear and convincing evidence that M. had previously made a false accusation of sexual impropriety. Therefore, there was no basis for Grove's proposed question, and the trial court permissibly found a substantial danger of unfair prejudice to the state. Grove contends that § 13-1421(B) required the trial court to hold an evidentiary hearing before making its ruling to "determine whether [M. had] admitted making the statement but said she was just kidding, or whether she denied making any statement whatsoever." However, Grove failed to request such a hearing, even though § 13-1421would suggest such a hearing would be a prerequisite to the introduction of any false accusation evidence. Section 13-1421(B) does not require an evidentiary hearing prior to the exclusion of evidence.

¶18 Grove's convictions and sentences are affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge